



SEP 1 2 2001

Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY,

Plaintiff,

v.

ENRON CORPORATION, et al.

Defendants.

§ CIVIL ACTION NO. 01-CV-3624
§ (Consolidated)
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THE OUTSIDE DIRECTORS' RESPONSE IN OPPOSITION
TO MOTION FOR PROTECTION FILED BY THE
REGENTS OF THE UNIVERSITY OF CALIFORNIA

TO THE HONORABLE MELINDA HARMON:

Lead Plaintiffs, the Regents of the University of California, asked to be named fiduciaries of the purported *Newby* class when they sought and obtained Lead Plaintiff status in this litigation. Now, in a Motion for Protection filed while discovery is stayed, the Regents ask the Court to prejudge whether their depositions will be necessary when--and if--class certification discovery proceeds in this case. The Regents' preemptive strike is extraordinary for two reasons: It is premature and it is prevaricating.

The motion is plainly premature. The deposition notices in question¹ have been rendered moot by this Court's stay of discovery. When, and if, discovery proceeds following the motions to dismiss, the Court will be in a better position to judge the breadth of discovery necessary to test whether a class can be certified in this case. As a matter of the prudent use of resources, therefore,

¹The Outside Directors, on behalf of all of the Enron-insured defendants, cross-noticed the depositions of the *Newby* Plaintiffs. See Exhibit "A," attached.

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we respectfully submit that the Court should decline to rule on the Regents' motion until after discovery commences, when class certification deposition notices can be re-issued and their relevance can be evaluated in light of the remaining claims (if any).

The motion is also prevaricating. Reading the Regents' motion, one comes away with the impression of people who have been hailed into court involuntarily to answer a lawsuit and are now complaining of the burden it imposes on them. With respect, it was the Regents who sought to be named fiduciaries to this class. They knowingly assumed this fiduciary obligation; no one is more knowledgeable of the Regents' willingness and ability to discharge that obligation than the Regents themselves. The Regents nevertheless assert that they should not have to sit for an individual deposition to test whether their claims are typical of the class they seek to represent, or whether they are adequate class representatives. If the Regents persist in asserting that they are too important or too pressed² to provide discovery necessary to test their adequacy as representatives, that assertion will be highly relevant to the Court's consideration of whether the Regents have the "willingness and ability ...to take an active role in and control the litigation and to protect the interests of the absentees." *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479 (5th Cir. 2001).

The Bank Defendants have ably briefed these and many other points in their Opposition to the Regents' Motion for Protection, so we will not repeat (but instead will adopt) their arguments

²See Motion for Protection at 7 and 11. At various points in their motion, for example, the Regents and their witnesses assert that they should not be deposed in Houston, where this lawsuit is pending, because "their principal places of business" are in California, or that they should not be deposed at all because they are "apex-level individuals" whose depositions are sought for reasons of harassment. The Regents' hauteur notwithstanding, it is axiomatic that the defendants are entitled to test whether a class representative has claims typical of the class and can adequately represent their interests. The assertion that the Regents should not be required to come to Houston--where the class chose to sue--or that they are too important to be bothered with a deposition is, in light of the applicable law, nothing short of astounding.

here. We file this response only to offer two additional points for the Court to consider when it evaluates whether the depositions we have sought are relevant on typicality and adequacy of representation. *See* Fed. R. Civ. P. 23.

A party cannot serve as a class representative unless it has claims that are typical of those held by the class it seeks to represent. *See* Fed. R. Civ. P. 23(a). The Regents have proffered, as their sole witness on class certification, Jeffrey E. Heil, a Regents' employee who did not make a single decision to buy or sell Enron stock. We quote the pertinent part of Mr. Heil's Declaration in full:

As managing director for The Regents' public equity portfolio, I am responsible for the strategic focus and management of the equity portfolio. My duties include: formulating the equity investment strategy, developing the analytical tools, policies and procedures to achieve the investment objectives of the various U.S. equity investment portfolios. I am also responsible for managing the equity investment analyst staff. Former Treasurer Patricia Small approved the initial Office of the Treasurer's purchases of Enron stock. I monitored the performance of the Treasurer's investment in Enron. Enron stock was purchased by the Treasurer's office between May 2000 and January 2001 based on publicly available information.

See Heil Affidavit at ¶¶ 3 and 4. Mr. Heil's declaration is notable not only for its passive voice ("Enron stock was purchased"), but also for the fact that it nowhere indicates that Mr. Heil made any investment decision at all with regard to Enron stock. This is a purported class of purchasers of stock, not of those who "monitored" portfolios that already held Enron stock. According to Mr. Heil's affidavit, the person who comes closest to having made a decision to buy Enron stock is Ms. Small--whom the Regents curiously did not proffer as a proposed witness. It may be that there are people (either the Regents themselves or their employees³) who are competent to testify to what they

³Importantly, neither the Regents nor the other deponents noticed by the Outside Directors has filed an affidavit denying that they have personal knowledge of the Regents' decisions to buy

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relied on when they bought Enron stock for the Regents' portfolio--but Mr. Heil's testimony that he sets strategy or monitors investments is not evidence from which this Court could infer that the Regents' claims are typical of the putative class in *Newby*.

In addition, as has been indicated earlier, inquiry into the adequacy of a proposed representative is mandatory when a court considers whether to certify a class. *See Berger*, 257 F.3d at 479. This Court earlier denied Lead Plaintiff status to the State of Florida--an institutional investor with losses far greater than those of the Regents--because of concerns that Florida might be distracted from its role as Lead Plaintiff in Enron by fiduciary responsibilities it had assumed in other class actions where it was already Lead Plaintiff. *See Order Appointing Regents Lead Plaintiff* at 77 - 79. Recently, however, the Regents have sought Lead Plaintiff status in the Dynegy case. Dynegy is another massive securities class action also pending in the Southern District of Texas.⁴ This Court must inquire as to the ability and resources of the Regents to manage and coordinate two massive securities class actions, at the same time, in the same stages of litigation, through the same counsel. The Regents' depositions are relevant to whether they--and their staff and counsel--have the wherewithal to discharge fiduciary obligations to two separate, and massive, classes of plaintiffs at the same time. If the Regents are unwilling, or unable, to appear in person to explain how they plan to do that, the Court should consider that when class certification is litigated in this case.

or sell Enron stock.

⁴The Regents' counsel in that case, as in this one, is Milberg Weiss. *See* Docket Entry 32, *Perelli Armstrong v. Dynegy Inc., et al.*, C.A. No. 02-CV-1571 (S.D. Tex.), Ex. "B" attached. A copy of the Milberg firm's press release concerning the Dynegy action may be obtained on their website, www.milberg.com/mil-cgi-bin/mil?case=dynegy.

Conclusion

The Regents' Motion for Protection is premature, because it seeks to create a discovery dispute where none now exists. If the Regents' complaint survives a motion to dismiss, the Court can then consider an appropriate scope for class discovery in the case. We submit, however, that any such scope should plainly include: (a) personal depositions of the Regents, who are themselves the fiduciaries to this putative class; and (b) depositions of staff with personal knowledge of the decisions to buy and sell Enron stock in the Regents' portfolio. Testimony from witnesses who are not themselves charged with fiduciary obligations, or who lack the knowledge necessary to determine whether the Regents' claims are typical, is tantamount to no discovery at all on issues critical to class certification.

ACCORDINGLY, for the reasons stated above, and those stated in greater detail in the Bank Defendants' response, the Regents' Motion for Protection should be denied.

Dated: September 12, 2002.

Respectfully submitted,

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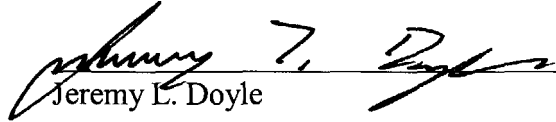
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this pleading was served on all counsel of record on the Service List on September 12, 2002 via posting to www.esl3624.com in compliance with the Court's Order Regarding Service of Papers and Notice of Hearings Via Independent Website.


Jeremy L. Doyle

The Exhibit(s) May

Be Viewed in the

Office of the Clerk